

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$11,462.78 for the period October 1, 2015 through March 4, 2017; (2) whether OWCP properly found appellant at fault in creating the overpayment and, therefore, the overpayment was not subject to waiver of recovery; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation.

On appeal appellant contends that OWCP created the overpayment as it delayed the recalculation of his FECA benefits for 15 months after he reached 62 years of age. He asserts that he was not at fault in creation of the overpayment as he did not understand how his FECA payments were calculated, and disclosed all relevant information regarding his Social Security Administration (SSA) benefits in EN1032 forms. Appellant also argues that recovery of the overpayment would be against equity and good conscience as he has no financial assets.

FACTUAL HISTORY

OWCP accepted that on November 2, 2006 appellant, then a 57-year-old presser supervisor, unloaded washers and dryers in the performance of duty and sustained a lumbar sprain, aggravation of lumbar stenosis from L3 through S1, aggravation of an intervertebral disc disorder with myelopathy from L3 through S1, and aggravation of a displaced L4-5 disc without myelopathy. He stopped work on December 3, 2006 and did not return. On February 9, 2007 appellant had an authorized L3 to S1 decompression with L4 to S1 fusion.³ OWCP paid appellant compensation for total disability on the periodic rolls commencing January 7, 2007.

In a Form CA-1049 letter dated February 9, 2007, OWCP notified appellant that he must report any retirement income "from any Federal agency," as a FECA compensationner was not permitted to receive benefits under the Civil Service Retirement System (CSRS) or "certain other Federal programs." OWCP also notified appellant that if he received or filed for social security disability benefits, he should contact the appropriate social security office about his FECA compensation.

Appellant submitted annual affidavits of earnings and employment (Form EN1032) on October 9, 2007 and October 4, 2008, noting that he had not returned to work and had not received any SSA benefits.

On June 11, 2009 OWCP notified appellant that it proposed to reduce his wage-loss compensation based on his ability to earn wages in the constructed position of hotel clerk. Appellant responded in a July 2, 2009 letter, in which he asserted that his treatment for metastatic cancer disabled him from all work. By decision dated July 21, 2009, OWCP reduced his wage-

³ OWCP provided vocational rehabilitation services to appellant in 2008. Appellant's vocational rehabilitation plan was put in interrupted status in December 2008 due to a nonoccupational diagnosis. OWCP closed the vocational rehabilitation effort on June 22, 2009.

loss compensation effective August 2, 2009, based on his ability to earn wages in the constructed position of hotel clerk.

Appellant submitted a completed Form EN1032 on October 8, 2009 and October 6, 2010. He indicated that he had not received SSA benefits.

In a July 12, 2011 letter, the SSA noted that appellant may have been entitled to both social security disability benefits and FECA compensation benefits. To determine whether his FECA benefits required a reduction in his SSA disability benefits, SSA requested that OWCP provide the amount of appellant's FECA benefits every 28 days commencing December 1, 2008. OWCP responded on September 7, 2011 with a print-out of FECA wage-loss compensation benefits paid beginning November 23, 2008.

In an October 3, 2011 letter, OWCP notified appellant that 5 U.S.C. § 8116(d)(2) required the reduction of continuing compensation benefits if a claimant had begun receiving SSA retirement benefits based upon age and federal service. It explained that it had notified appellant of this requirement as its records indicated appellant was nearing age 62, the minimum age at which an individual would be eligible to receive SSA retirement benefits. OWCP explained that a failure to report receipt of SSA retirement benefits to OWCP could result in an overpayment of FECA compensation. It also instructed appellant to contact it immediately if he had been approved for SSA retirement benefits or had begun to receive them.

In an October 8, 2011 Form EN1032, appellant advised that he had been assigned a Civil Service Annuity (CSA) number, but had not yet received SSA retirement benefits related to his federal service.⁴

In a November 9, 2011 telephone memorandum (Form CA-110), OWCP noted that appellant, who had been born on October 24, 1949, had reached 62 years of age. SSA had therefore informed appellant that it would transition his SSA benefits from disability retirement to age-related retirement benefits. Appellant stated that he would submit appropriate documentation to OWCP.

On November 9, 2011 OWCP requested that SSA specify the amount of monthly benefits paid to appellant commencing November 2, 2006 with and without the Federal Employees Retirement System (FERS) offset attributable to his federal service.

Appellant provided a November 7, 2011 SSA Notice of Award which notified him of his entitlement to monthly SSA retirement benefit payments in the amount of \$1,001.00 commencing in November 2011.

⁴ Appellant signed similar EN1032 forms on October 5, 2012, October 6, 2013 and October 7, 2014. In each form, he advised that he had not received "benefits from the SSA as part of an annuity for [f]ederal service," but had been assigned a CSA number.

On May 7, 2013 OWCP again requested that SSA specify the amount of any monthly benefits paid to appellant commencing October 1, 2011, with and without the FERS offset attributable to his federal service.

In a January 15, 2015 letter, OWCP requested that appellant indicate if he received SSA disability retirement benefits, and if so, the date that such benefits commenced. Appellant telephoned OWCP on January 29, 2015 and affirmed that he received SSA benefits. He submitted a corrected Form EN1032 on January 26, 2015, in which he noted that he received \$1,499.00 a month in SSA disability benefits.

In a Form EN1032 signed by appellant on October 5, 2015, appellant responded “yes” to Part D, Question 2.a., “Do you receive benefits from the SSA as part of an annuity for [f]ederal service?” He noted that he received \$1,500.00 a month from SSA as an annuity for his federal service.

In a completed Form EN1032 signed by appellant on October 17, 2016, appellant responded “yes” to Part D, Question 2.a., “Do you receive benefits from the SSA as part of an annuity for [f]ederal service?” He noted that he received \$1,499.00 a month from SSA as an annuity for his federal service.

On November 9, 2016 OWCP requested that SSA specify the amount of any monthly benefits paid to appellant commencing October 24, 2014 with and without the FERS offset attributable to his federal service.

SSA responded on November 30, 2016 with benefit entitlement amounts for appellant, as follows: commencing October 2015, \$1,649.20 with FERS and \$982.20 without; beginning December 2015, \$1,649.20 with FERS and \$982.20 without; and commencing December 2016, \$1,654.10 with FERS and \$985.10 without. It noted that appellant “was entitled to retirement starting October 2015 to present time (subject to SSA/FERS offset).”

In a March 2, 2017 worksheet, OWCP calculated that appellant had been overpaid \$11,462.78 from October 1, 2015 to March 4, 2017 as it failed to offset FERS retirement benefits from ongoing FECA benefits. It determined that from October 1 to November 30, 2015, a period of 61 days, appellant received a \$1,341.33 overpayment of compensation as the FERS offset of \$615.69 every 28 days, or \$21.988 each day, had not been deducted. OWCP then determined that from December 1, 2015 to November 30, 2016, a period of 366 days, appellant received an \$8,047.98 overpayment of compensation as the FERS offset of \$615.69 every 28 days, or \$21.988 each day, had not been deducted. Finally, it calculated that from December 1, 2016 to March 4, 2017, a period of 94 days, appellant received a \$2,073.47 overpayment of compensation, based on a FERS offset of \$617.63 every 28 days, or \$22.058 each day. OWCP totaled the three overpayments to equal \$11,462.78.

Commencing March 5, 2017, OWCP adjusted appellant’s compensation to reflect a FERS/SSA benefit offset. It noted that his current SSA rate with FERS was \$2,000.00 and without FERS was \$1,170.39, which yielded an offset of \$617.13 every 28 days.

By notice dated March 13, 2017, OWCP advised appellant of its preliminary determination that he received an \$11,462.78 overpayment of compensation for the period October 1, 2015

through March 4, 2017, as the FERS offset was not deducted from his FECA wage-loss compensation. It found that appellant was with fault in creating the overpayment as he was aware or reasonably should have been aware that his FECA compensation benefits should have been offset by the amount of his SSA benefits for the period at issue. OWCP requested that appellant provide information regarding his income, assets, and expenses on an enclosed overpayment recovery questionnaire (Form OWCP-20).

Appellant signed a completed Form OWCP-20 on March 26, 2017. He contended that he was not at fault in creating the overpayment as he had completed and returned the forms OWCP had sent to him. Appellant explained that he first received Supplemental Security Income (SSI) payments and was “told that it did not affect” his FECA benefits. In 2014, he was transferred to SSA retirement benefits, and reported this change on CA-1032 forms. He listed monthly SSA benefits of \$2,482.00 and monthly SSI benefits of \$3,038.00. Appellant indicated that he had no dependents. He listed expenses of \$3,351.84 for rent or mortgage, \$250.00 for food, \$150.00 for clothing, and \$250.00 in miscellaneous expenses. Appellant also noted monthly debt payments totaling \$505.00. He indicated that he had no funds in bank accounts, cash on hand, or other financial holdings. Appellant did not submit any financial documentation in support of the income, assets, and expenses he specified in the Form OWCP-20.

By decision dated April 27, 2017, OWCP finalized its preliminary overpayment determination and found that appellant received an \$11,462.78 overpayment of compensation for the period October 1, 2015 through March 4, 2017. It found appellant with fault in creating the overpayment as he accepted payments which he knew or reasonably should have known were incorrect. OWCP noted that appellant had been sent an October 3, 2011 letter which notified him that he was approaching his 62nd birthday, and of the possibility of a prohibited dual benefit if his SSA retirement benefits were not offset from his FECA compensation. It found that appellant omitted his FECA benefits from the income listed on the Form OWCP-20, and failed to submit documentation of his expenses and assets as requested. Appellant’s total monthly income, including his FECA compensation payment, was \$6,690.39. Subtracting expenses of \$4,506.84 left monthly disposable income of \$2,183.55. OWCP therefore found that appellant could repay the debt through the deduction of \$200.00 from his continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁶

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service.⁷ If an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service. A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁸

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.⁹ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of the overpayment.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$11,462.78 because he received prohibited dual benefits for the period October 1, 2015 through March 4, 2017. Appellant received both wage-loss compensation under FECA and benefits under the SSA for the same period. As previously noted, the portion of the SSA benefits he received as a federal employee as part of his FERS retirement package concurrently with the benefits he received under FECA is a prohibited dual benefit.¹¹ OWCP requested and SSA provided information regarding appellant's applicable SSA rates and their effective dates. Based on these rates, it determined that the prohibited dual benefits he received from October 1, 2015 through March 4, 2017 created an overpayment of compensation in the amount of \$11,462.78. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received and finds that OWCP properly determined an overpayment of compensation in the amount of \$11,462.78 for the period October 1, 2015 through March 4, 2017.

⁷ 5 U.S.C. § 8116(d). *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁸ *See* 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a). *See also P.M.*, Docket No. 14-1832 (issued January 20, 2015).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

¹⁰ *J.G.*, Docket No. 17-0400 (issued January 12, 2018); *see L.B.*, Docket No. 11-2076 (issued August 29, 2012).

¹¹ *See L.M.*, Docket No. 16-1305 (issued November 27, 2017).

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹² The fact that the overpayment was the result of error by OWCP or another government employing establishment does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹³

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹⁴

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in creating the \$11,462.78 overpayment of compensation.

The record reflects that appellant accepted payments covering the period October 1, 2015 through March 4, 2017 which he knew or should have known to be incorrect.¹⁶ He was advised by OWCP in letters dated February 9, 2007 and October 3, 2011 that receipt of SSA retirement benefits would affect his entitlement to FECA compensation, but he continued to accept FECA benefits, without offset, during the period October 1, 2015 through March 4, 2017 in addition to his SSA retirement benefits.

¹² 20 C.F.R. § 10.433(a).

¹³ *Id.*

¹⁴ *Id.*; see *Kenneth E. Rush*, 51 ECAB 116 (1999).

¹⁵ *Id.* at § 10.433(b).

¹⁶ *J.G.*, *supra* note 10; see *J.C.*, Docket No. 16-1889 (issued May 17, 2017).

Commencing October 9, 2007 on CA-1032 forms through October 7, 2014, appellant was asked if he received SSA retirement benefits as part of an annuity under FERS benefits from federally-assisted disability or benefit programs as this would affect his benefits from OWCP. He correctly answered “No.” On the CA-1032 forms signed by appellant on October 5, 2015 and October 17, 2016, appellant reported correctly that he was in receipt of SSA retirement benefits as part of an annuity for federal service. By signing these forms, appellant acknowledged that he was in receipt of a prohibited dual benefit.

Despite being given notice that receipt of SSA benefits would reduce his entitlement to FECA compensation, appellant continued to accept full FECA benefits during the period October 1, 2015 through March 4, 2017. The Board thus finds him at fault under the third standard, as he accepted compensation which he knew or should have known that he was not entitled to receive and, as such, recovery of the overpayment of compensation in the amount of \$11,462.78 may not be waived.¹⁷

On appeal appellant continues to allege that he was not at fault in the creation of the overpayment as he provided OWCP with complete and correct information on multiple CA-1032 forms, and did not understand how his payments were calculated. As noted above, he had been notified by February 9, 2007 and October 3, 2011 that he was not entitled to receive SSA retirement benefits based upon his FERS annuity simultaneously with FECA compensation payments. Appellant also contends that OWCP created the overpayment as it unreasonably delayed 15 months after he turned 62 to recalculate his FECA benefits. Even if an overpayment resulted from negligence by OWCP, this does not excuse appellant from accepting payment which he knew or should have been expected to know he was not entitled to receive.¹⁸

The Board, therefore, concludes that OWCP properly determined that appellant was at fault in the creation of the overpayment and that waiver of recovery of the overpayment is therefore precluded.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the financial information appellant submitted as well as the factors set forth in section 10.441. As appellant’s monthly income was \$6,690.39 and his monthly expenses were \$4,506.84, OWCP did not abuse its discretion in setting

¹⁷ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a).

¹⁸ 20 C.F.R. § 10.435(a); *see William E. McCarty*, 54 ECAB 525 (2003).

¹⁹ 20 C.F.R. § 10.441(a).

the rate of recovery as \$200.00 from each of his continuing compensation payments every 28 days. The Board finds that OWCP properly determined the recovery of the overpayment in this case.

On appeal appellant contends that recovery of the overpayment would be against equity and good conscience as he has no financial assets. As found above, OWCP took into consideration the financial information submitted by appellant, as well as the factors set forth in section 10.441(a) of its regulations in determining that the \$200.00 deduction from his 28-day compensation payments would minimize any hardship.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,462.78 for the period October 1, 2015 through March 4, 2017. The Board further finds that OWCP properly found him at fault in creating the overpayment, and that the overpayment was therefore not subject to waiver of recovery. The Board further finds that OWCP properly determined that it would recover the overpayment by deducting \$200.00 every 28 days from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 27, 2017 is affirmed.

Issued: May 4, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board